

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
MIDDLE DIVISION**

UNITED STATES OF  
AMERICA,

Plaintiff,

vs.

MARTIN TRACY McBURNETTE,

Defendant.

\* 4:08-cr-00252-IPJ-PWG

\*

\*

\* March 24, 2009

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\* 9:00 a.m.

\*

\* Birmingham, Alabama

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**TRANSCRIPT OF SENTENCING HEARING  
BEFORE THE HONORABLE INGE P. JOHNSON  
UNITED STATES DISTRICT JUDGE**

\* \* \* \* \*

For the Plaintiff: Daniel J. Fortune, Esq.  
Laura D. Hodge, Esq.  
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For the Defendant: Michael V. Rasmussen, Esq.  
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Court Reporter: Leah Sharp Turner, CSR, RMR, CRR  
Federal Official Court Reporter  
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1           This cause came to be heard and was heard on the  
2           24th day of March 2009 before the Honorable Inge P.  
3           Johnson, United States District Court Judge, holding court  
4           for the Northern District of Alabama.

5           Proceedings continued as follows:

6                       (COURT CALLED TO ORDER.)

7           THE COURT: This is cr-08-252, the United States  
8           vs. Martin Tracy McBurnette. Let the record show  
9           Mr. McBurnette is present with his attorney, Michael  
10          Rasmussen; and Daniel Fortune and Laura Hodge are here from  
11          the U.S. Attorney's Office. Kim Franklin is here from U.S.  
12          probation.

13          I would like for the record to reflect this is  
14          the day set for sentencing of Mr. McBurnette.  
15          Mr. Rasmussen, have you and your client had 35 days in  
16          which to review the presentence report?

17          MR. RASMUSSEN: We have, Your Honor.

18          THE COURT: Before we actually go to sentencing,  
19          is there a stipulation with respect to -- or is there an  
20          agreement with respect to the restitution?

21          MR. RASMUSSEN: Yes, Your Honor. We have agreed  
22          that in lieu of restitution and forfeiture Mr. McBurnette  
23          will deed over the property that is the subject of the  
24          forfeiture -- that is, the property on Rocky Ford Road --  
25          to the child victim, and that is a binding agreement. He  
26          will personally affirm that agreement if you wish.

1 THE COURT: That is in lieu of restitution?

2 MR. RASMUSSEN: And forfeiture, Your Honor.

3 THE COURT: I assume the forfeiture count is then  
4 going to be dismissed once the deed is signed?

5 MR. RASMUSSEN: Yes, Your Honor.

6 MR. FORTUNE: That's correct, Your Honor. The  
7 Government would just ask that the Court in regards to the  
8 forfeiture matter continue the sentencing as to that issue  
9 just so the Court reserves jurisdiction over the forfeiture  
10 matter.

11 THE COURT: I just need to know -- and I know  
12 Mr. Donald Ray is here on behalf of Mrs. McBurnette,  
13 Mr. McBurnette's mother. She filed yesterday withdrawing  
14 her claim of title and interest in and to the property  
15 sought to be forfeited by the Government?

16 MR. RAY: Yes, ma'am.

17 THE COURT: But I think if there is going to be  
18 deeds issued voluntarily, she either needs to satisfy the  
19 mortgage or issue a quitclaim deed. Would that quitclaim  
20 deed be to the minor child?

21 MR. RAY: It will be to [redacted], and I expect  
22 I will be preparing both instruments. There will be a  
23 warranty deed from Martin Tracy McBurnette to [redacted],  
24 and it will also be from Linda Lou Frix McBurnette. She is  
25 not married. It will be also a quitclaim deed to

1 [redacted].

2 THE COURT: That will be fine, and I will be glad  
3 to withhold my jurisdiction with respect to the forfeiture  
4 until such time as the parties inform that the deeds have  
5 been signed and the property has been transferred.

6 Thank you so much, Mr. Ray. You may leave. You  
7 are excused.

8 I have read the presentence report, and I know  
9 there are some objections. Actually, I have read  
10 everything. I have read a letter from Brenda Chapman, the  
11 minor child's mother, that I got today. I have read a  
12 report and a CV for Nancy Aldridge, Ph.D., who apparently  
13 did a psychological evaluation of the defendant. I have  
14 obviously read the presentence report, the objections filed  
15 by the defendant, the sentencing memo filed by Mr. Fortune,  
16 and letters. I guess we should go to the objections first.

17 The first objection is the defendant's objection  
18 to paragraph No. 7. Do you wish to say anything else about  
19 that?

20 MR. RASMUSSEN: Your Honor, I believe that we  
21 have agreed to have that amended.

22 THE COURT: I should say that the record should  
23 reflect that we met in chambers prior to the hearing here  
24 in open court, and the parties have agreed that the  
25 statements made by the minor female at the interview on

1 November 7, 2007, regarding whether or not there was  
2 penetration should be included in the presentence report,  
3 and paragraph 7 should be amended to reflect that rather  
4 than what is in paragraph 7. Am I correct, Mr. Fortune?  
5 Ms. Hodge?

6 MR. FORTUNE: Yes, Your Honor. Within the  
7 defendant's psychosexual evaluation report, in the  
8 paragraph it basically begins -- the Government would ask  
9 that it reflect using that language where it begins she  
10 stated that Tracy touched her privates.

11 THE COURT: That's what I plan, and I will give  
12 you a copy of it so you will have it. Let the record show  
13 that paragraph 7 of the presentence report is so amended.

14 The next objection is objection No. 2 to  
15 paragraph 12. The defendant objects to not receiving an  
16 adjustment for acceptance of responsibility. Do you want  
17 to argue that?

18 MR. RASMUSSEN: I do, Your Honor. Your Honor,  
19 one of the responses by the probation officer concerned  
20 whether or not -- what were the reasons for going to trial  
21 whether or not it would preserve any issues. It had  
22 nothing to do with guilt or innocence. And there were  
23 motions regarding the unconstitutionality as applied to  
24 this defendant. That doesn't necessarily go to the merits  
25 of the case. So we did file a motion to dismiss on that

1 count.

2 We also filed a motion to dismiss on the form of  
3 the indictment, which also has nothing to do with the  
4 acceptance of guilt or responsibility. I would also note  
5 that with regard to preserving issues that you should be  
6 allowed to raise on appeal, in the Government's plea  
7 agreements the Government specifically requires a defendant  
8 to waive any sentencing issues. That has nothing to do  
9 with guilt or innocence. That just has to do with  
10 sentencing. So we did have reasons for -- we were  
11 preserving our rights, rights which had nothing to do with  
12 the merits of the case or nothing to do with what he did or  
13 didn't do.

14 The probation officer also says that we required  
15 the victim to testify. We did not require the victim to  
16 testify. Even by going to trial, we did not require the  
17 victim to testify.

18 With regard to Count 1, the only issue was  
19 whether or not the materials that were used to make the  
20 movie were produced in interstate commerce. The child's  
21 testimony had nothing, added nothing to that whatsoever.  
22 The only thing that her testimony was relevant to was  
23 Count 2 in which he was found not guilty. He shouldn't be  
24 punished for not accepting responsibility for something the  
25 jury found he didn't do.

1           So I think the comment that the defendant  
2           required the victim to testify should be a nonfactor in  
3           this case.

4           Furthermore, Your Honor, there are other reasons  
5           that have to do with why we went to trial. It had to do  
6           with the state case that was pending -- why we didn't  
7           plead. If we would have pled, that would have impacted the  
8           state case, and the state case hadn't been resolved. I  
9           will say more about that later on. The fact is that there  
10          are many reasons why it went to trial. It had nothing to  
11          do with not accepting responsibility. The defendant  
12          accepts responsibility for what he did to this child, and  
13          he should be given credit for acceptance of responsibility.

14          THE COURT: Why are you saying that he accepted  
15          responsibility aside from what the probation officer wrote?

16          MR. RASMUSSEN: He admitted what he did to this  
17          child. He admitted what he did to this child. Now, as to  
18          interstate commerce, he doesn't know. He admitted what he  
19          knows. He admitted what he did.

20          THE COURT: Anything from you, Mr. Fortune?

21          MR. FORTUNE: Your Honor, once again the  
22          defendant did not make any sort of a prompt admission into  
23          what he did or did not do with the child. In fact, at the  
24          time -- which was clear from the motion hearing as well as  
25          present at trial -- when officers were at his residence

1 clearly looking for child pornography, he did not admit  
2 what he did. He did not tell them everything that he did.  
3 He actually didn't indicate whether he had -- when he  
4 actually was called to testify at the motion hearing and I  
5 directly asked him, you knew what was on those tapes that  
6 were found up there, his response was I didn't know what  
7 they were going to find up there.

8 And we have no statements, no statements that he  
9 made to any law enforcement officers where he admitted to  
10 what he did to the child, which is what he was convicted  
11 for of Count 1.

12 Although the jury found him not guilty of  
13 Count 2, the Government did not receive any admission from  
14 this defendant as to Count 1 or as to Count 2, and we were  
15 required to present testimony of the victim. One, she had  
16 to identify herself in regard to Count 1. She also had to  
17 talk about the use of the Internet and the use of the  
18 computer by this defendant. So he definitely should not  
19 receive the third point, nor should he receive the first  
20 two points for acceptance of responsibility.

21 When they executed the search warrants, he didn't  
22 admit to that; and then even through motion hearings, there  
23 was no admissions on behalf of the defendant as to his  
24 acceptance of responsibility, absolutely none.

25 MR. RASMUSSEN: If I may briefly respond, Your



1 Honor, there is no requirement that acceptance of  
2 responsibility be fixed at the first time he has contact  
3 with law enforcement. The question is: Does he now accept  
4 responsibility for what he did? He does now accept  
5 responsibility for what he did, and before trial and during  
6 trial he accepted responsibility for what he did.

7 THE COURT: I cannot agree with you,  
8 Mr. Rasmussen. You all have given me this most interesting  
9 forensic psychosexual evaluation. I assume I was supposed  
10 to read it since it was submitted to me. I think it's most  
11 interesting that your client, Mr. McBurnette, told the  
12 doctor as follows on page 8 at the bottom: "He" -- that  
13 means Mr. McBurnette -- "stated the abuse of the child did  
14 not occur because he was aroused by children. He abused a  
15 child because he felt he could get away with it. Again he  
16 reiterated it was not that he wanted to have sexual contact  
17 with the child. He wanted to have sex, and she was there.  
18 He does not lust after children. He tricked the child into  
19 having sexual contact with him. It was not the child he  
20 was interested in. It was the sexual experience."

21 So that's what he says now when he was visited by  
22 the good doctor on March 4, 2009, two weeks ago. So he is  
23 saying he was not actually interested in hurting the child.  
24 He just did that because she was there and he could get  
25 away with it. However, regardless of what is said by

1 anybody so far about this issue including what is in the  
2 probation officer's response, he had on his computer and he  
3 is charged with and was convicted of sexual exploitation of  
4 a child. He had the URL search terms and Web sites  
5 containing words such as "preteen Lolitas, little kids  
6 f-u-c-k-i-n-g, first CP, CP loving, CP paradise, little  
7 bitch, 10-year-old sex pics," and all the other things that  
8 were testified to. Without me having to say all of that on  
9 the record, it's spelled out in the Government's brief on  
10 page 11 as to what he had and looked up on his computer,  
11 which certainly does not indicate that he was only  
12 interested in sex and he just used the child because she  
13 was there. He was specifically looking up child  
14 pornography on his computer. At least he had those Web  
15 sites and search terms.

16 And I also would like to say from the  
17 psychological evaluation on page 8, he says, "How can a  
18 person who is basically so good, how could that person do  
19 something so horrible?"

20 He is still questions and apparently thinks he is  
21 so good and questions how could he do that, and that  
22 doesn't show to me that he has accepted responsibility.  
23 I'm going to overrule that objection.

24 MR. RASMUSSEN: Your Honor --

25 THE COURT: I have overruled that objection. We

1 are going to go to the next.

2 MR. RASMUSSEN: I understand.

3 THE COURT: I gave you a chance to say anything  
4 you wanted to. The next objection is paragraph 17. The  
5 defendant objects to the quote otherwise in the care,  
6 custody, and supervisory control of the defendant. That is  
7 the enhancement or the extra 2 points for 2(g)(2.1)(B)(5).  
8 Do you want to say anything else about that?

9 MR. RASMUSSEN: Your Honor --

10 THE COURT: And I will have to say the objections  
11 were very limited. I don't have the benefit of your  
12 conversations with probation and the Government. You say  
13 in your objection that you have -- and I'll have to read  
14 it. You say here, "Due to the sensitive nature of this  
15 case, the defendant has made more particular objections to  
16 the paragraphs and communications made directly to the  
17 probation office and the Government," and I'm not privy to  
18 those. I just have your written objections.

19 MR. RASMUSSEN: Yes.

20 THE COURT: So I'm just going by what I have, and  
21 the next one I have is to paragraph 17.

22 MR. RASMUSSEN: With respect to whether he is in  
23 custody, Your Honor, I did e-mail some materials and more  
24 information of our position to the probation office and the  
25 Government. I don't have a copy of that e-mail.

1 THE COURT: Neither do I.

2 MR. RASMUSSEN: But I would add these two facts  
3 or point out these two facts: She didn't go up there to  
4 see the defendant. She didn't go up there to be taken care  
5 of by the defendant. She went up there to see her dog.  
6 And when she told him she didn't want to do it anymore, she  
7 didn't go up there anymore. And those are two factors  
8 which tend to indicate that she was not in his custody.

9 THE COURT: Anything from the Government?

10 MR. FORTUNE: Your Honor, the child was 7 1/2 or  
11 8 years old at the time of the victimization. She  
12 initially began going when she was 7. She is a longtime  
13 friend of the family. A 7-year-old going to the neighbor's  
14 house is in the control of an adult. And at this time, it  
15 was a trusted adult, a friend of the family.

16 You even saw that in the video. There were times  
17 when he controlled her. He told her where to sit, told her  
18 what to do, what not to do and then sent her home. When  
19 the parents wanted her home, they called this defendant  
20 because this defendant had control of that 7-year-old to  
21 send her. Even though temporary, for limited purpose, et  
22 cetera, she was 7 1/2 years old. He was watching her when  
23 she was at his house playing with her dog that he now had  
24 custody of, Your Honor.

25 We believe that that enhancement should apply as

1 further enumerated in our response filed as document 70 in  
2 the record on page 12 of that document.

3 THE COURT: Anything else?

4 MR. RASMUSSEN: No, Your Honor.

5 THE COURT: I have read United States vs.  
6 Jennings that the probation officer cites in the response,  
7 and it's dated June 3, 2008. It's 280 -- I mean page 836,  
8 Eleventh Circuit. I don't find it particularly helpful  
9 because it's not really an analogous situation, but I will  
10 have to say that I'm going to overrule this objection for  
11 several reasons.

12 First of all, he had physical control over her.  
13 She was sitting in a chair in his trailer blindfolded, and  
14 I remember from seeing the videotape during the trial that  
15 particularly when he had ejaculated into her mouth and she  
16 wanted to spit it out, her blindfold was coming off and she  
17 wanted -- she acted like she was starting to pull it off,  
18 and he pushed it back. Then she asked for something to  
19 spit it out in. He handed her a towel, and again the  
20 blindfold was adjusted by him when she --

21 MR. RASMUSSEN: Your Honor --

22 THE COURT: I'm not finished.

23 MR. RASMUSSEN: I'm sorry. I just don't know if  
24 we need to put that in the record.

25 THE COURT: Well, I have to make my record, and

1 I'm making it. She didn't get to get up. She didn't get  
2 to take her blindfold off. Then she is obviously not --  
3 she is very uncomfortable. Let me put it that way. And he  
4 says, "We are not through yet." And then he makes her eat  
5 a hot dog or sticks a hot dog with mustard or mayonnaise in  
6 her mouth, and she is about to throw up. I think that in  
7 and of itself shows that he at least had physical control  
8 over her.

9 Secondly, he told her not to tell her parents and  
10 he wouldn't tell about the puppy coming into the home.  
11 That is typically a statement -- like don't tell your  
12 parents or don't tell anybody, that's our little secret, is  
13 typically a statement made by someone who has supervisory  
14 control over somebody else.

15 Finally, he told her that she couldn't bring the  
16 puppy in, which is also a statement by somebody who was in  
17 physical control of somebody else, directing her what to do  
18 or what not to do. I think all of those facts taken  
19 together show that, first of all, he was exercising  
20 supervisory control over her; but, secondly, he also had  
21 physical custody of her. And it looked to me like she was  
22 ready to get out of that chair earlier than she was  
23 permitted to get out of that chair, and I think for those  
24 reasons that objection is due to be overruled.

25 Then there is objection 4 to paragraph 24 of the

1 enhancements pursuant to 4b1.5(b) of the guidelines.

2 Anything else about that?

3 MR. RASMUSSEN: No, Your Honor. I just wanted to  
4 preserve that for the record.

5 THE COURT: Anything from the Government?

6 MR. FORTUNE: Your Honor, the Government would  
7 rely upon once again the written response that we wrote.  
8 Also, I believe the pattern of sexual conduct that was  
9 engaged in is also reflected in BC's mother's letter to the  
10 Court as well. If the Court does need additional evidence  
11 as to the pattern of the conduct that the victim in fact  
12 did inform law enforcement that the sexual molestation  
13 occurred at least 20 times, I have Special Agent Daniel  
14 Barnett of the FBI here to relate that information.

15 THE COURT: Well, there was testimony, at least  
16 at the pretrial motion hearings, that it had happened  
17 20 times over this period of time that the minor child told  
18 law enforcement officials about, and no one has  
19 contradicted that. No one to my knowledge has contradicted  
20 that it took place at least 20 times. I don't know that  
21 anybody has contradicted that. I'm going to overrule that  
22 objection.

23 And with respect to objection No. 5, which is  
24 paragraph 35, 36, 37, 40, 43, 45, and 49, the probation  
25 officer has amended the report to reflect those changes so

1 that those changes are now resolved.

2 Any other objections?

3 MR. RASMUSSEN: No, Your Honor.

4 THE COURT: Any objections from the Government?

5 MR. FORTUNE: No, Your Honor.

6 THE COURT: All right. Having ruled on the  
7 objections, the Court adopts the factual statements  
8 contained in the presentence report with the exception of  
9 paragraph 7 which I have amended -- and that change does  
10 not change the guideline calculations -- and makes the  
11 specific findings that the guideline offense level is 43.  
12 The criminal history category is I. The advisory guideline  
13 imprisonment range is 360 months. Further, the supervised  
14 release period is any term of years up to life. And the  
15 fine ranges from 25,000 to \$250,000.

16 Restitution was an issue in this case, but has  
17 been resolved by the parties as stated prior to this here  
18 on the record. And I understand the guidelines are not  
19 binding, but the Court does have a duty to take them into  
20 consideration, at least establish what they are, and then  
21 go from there to decide what is a reasonable sentence in  
22 each case.

23 So I'm going to allow everybody to speak before I  
24 sentence the defendant. And, Mr. Rasmussen, if you would  
25 like to go first, that would be fine if you have anything



1 to say in mitigation or otherwise. Mr. McBurnette, if you  
2 have anything you wish to say, if you have any witnesses  
3 you wish to speak for you, and then I'm going to allow the  
4 Government to present witnesses, if any, and also to speak  
5 with respect to the sentence.

6 MR. RASMUSSEN: Your Honor, Congress has said  
7 that the sentence is 15 years to 30 years, and I submit  
8 that there is a bell curve of defendants. Many of them  
9 have come before you, and the question I would pose and  
10 what I'm going to argue about is: Where on that bell curve  
11 does this defendant fit? Of course, my argument is that he  
12 should be on this end of the bell curve because he is not  
13 this extremely dangerous person that has done so much in  
14 the past. He has done this one time. In considering that,  
15 I think you have to consider his background, which is a  
16 3552 factor. So I'm going to talk for some time about his  
17 history and the factors that I think led him into this  
18 behavior.

19 And if you could go ahead and show my  
20 PowerPoint. It's not showing on this screen. Let me try  
21 one other thing.

22 THE COURT: What are you trying to show me?

23 MR. RASMUSSEN: A PowerPoint.

24 THE COURT: Well, talk. I will listen.

25 MR. RASMUSSEN: Mr. McBurnette was born in Etowah

1 County. This is a picture of his mother. His mother is  
2 here right now. He had a fairly normal upbringing. His  
3 father was a very interesting gentleman and a renowned  
4 artist and craftsman. Among other things, he made knives,  
5 and he's actually world famous for making knives. If you  
6 were to put his name in the Internet search engine, you  
7 would pop up hundreds of Web sites which talk about the  
8 quality of his work. And this bears later on to something  
9 that happens later on to Mr. McBurnette after his father  
10 died.

11 What you see here is a picture of him and his  
12 family. There is his -- I don't know what that red dot is  
13 doing there. That is his sister. That is his older  
14 brother and his grandparents behind him.

15 One of the first tragedies in his life -- we will  
16 talk about his love for animals and how that came about,  
17 but one of the first tragedies in his life is when his  
18 older brother was killed in a car wreck. And for years he  
19 had to drive by the place where he was killed, and that was  
20 a very traumatic experience for him. But he still seemed  
21 to grow up and have a fairly normal life.

22 This is a picture of him in junior high school.  
23 He was a fairly bright child. His mother will tell you  
24 more about that. He was somewhat athletic. He played some  
25 football and played basketball. He was one of those people

1 in school that didn't work a lot but managed to make good  
2 grades. And he did have some achievements when he was in  
3 high school, as you can see from these different awards.  
4 He was also interested at the end of his high school career  
5 in music; and he was, in fact, a member of a bluegrass band  
6 with the 4-H Clubs and was a champion band in his -- I  
7 forget exactly what the competitions were, but he did very  
8 well in that band.

9 So things were going along pretty well, and then  
10 he went and joined the Navy. At the time, he had a  
11 girlfriend Tammy, who I think you read about in the report.  
12 This is a picture of the wedding with his mother, his  
13 father, and his sister, and of course Tammy. And he served  
14 six to eight years in the Navy. He had submarine training  
15 and was actually graduated at the top of his class in major  
16 submarine training school. He spent some years in the  
17 Navy, and then he will tell you that -- or I would tell you  
18 that he hurt his back in the Navy moving some things around  
19 and became severely disabled, actually. But while in the  
20 Navy, he and his wife were separated for a period of time,  
21 which is hard on them. They would get together from time  
22 to time.

23 His father loved to go out west, loved to be in  
24 the Smoky Mountains, so he would take Tracy out there with  
25 his wife to visit his father and his mother. And

1 eventually his mother and his father and when he got out of  
2 the Navy, he moved out to New Mexico as well where his  
3 sister lived, his mother lived, and his father lived.  
4 That's his sister right there. That's his mother, and  
5 that's his sister's children. That's his grandmother who  
6 he is very fond of.

7           So they had a good relationship, but his marriage  
8 to Tammy fell apart. He became friends with another lady  
9 and moved out west, and that is Susan right there. And  
10 this is a picture of his brother-in-law, his mother, and  
11 that's Tracy right there. And all of his life, though, he  
12 had always been interested in animals. And these are just  
13 some of the certificates that he had that he was given for  
14 having taken care of different animals.

15           And I'm going to let some other people tell some  
16 stories about how he did that. This is one of his favorite  
17 dogs called "Big Brown." And, of course, when he moved  
18 back to Alabama and Hurricane Katrina occurred, he took  
19 some trips out to Hurricane Katrina to take care of those  
20 dogs.

21           Now, something else happened, though. His  
22 brother had died. And then when his father was out west,  
23 his father developed cancer. And they went through a very  
24 difficult time while his father tried to beat the cancer.  
25 He couldn't beat it. Tracy took care of his mother. But

1 then his father died, and his relationship with Susan also  
2 fell apart. So his brother had died. His father had died.  
3 He had two failed relationships, long-term relationships,  
4 with the women in his life, and all he had left was his  
5 animals.

6 He came back to Alabama. And when he came back  
7 to Alabama, he came back to Rocky Ford Road, and this is  
8 Dale Hutton. Dale Hutton is the brother and the uncle of  
9 the victim and was the defendant's best friend growing up.  
10 And Mr. Hutton lived on this plot of land that is the  
11 subject of the forfeiture and everything we have heard  
12 about. And Mr. Hutton, though, was into drugs and could  
13 not keep up his payments. That's really how Mr. McBurnette  
14 came to own this property. He took it over because of his  
15 mortgage and Mr. Hutton couldn't make it, and he allowed  
16 Mr. Hutton to live on this property in this trailer which  
17 you see behind you. But Mr. Hutton did not keep up the  
18 payments to Mr. McBurnette, and they had a falling out.  
19 They had litigation, and he was evicted from the property.  
20 So his best friend was now alienated from him.

21 What then happens is: He has come back to  
22 Alabama. His best friend is no longer his best friend. He  
23 doesn't have a family around him. He has failed  
24 relationships, and I think one of the worst things is that  
25 he didn't have to work because he is on disability.

1           And I know from my own experience that sometimes  
2   you need people around you who are going to prop you up,  
3   whether friends, whether family, whether they are  
4   coemployees. You go in, you fit into an organization and  
5   it sort of props you up. And my wife and I fight all the  
6   time. But if we didn't, I might go drifting off somewhere  
7   where I shouldn't be drifting off, and she might do the  
8   same thing. So we just keep each other honest.

9           But Mr. McBurnette lost those props. And then he  
10   became a social recluse. He started taking drugs about the  
11   first time in his life. He started taking crack and then  
12   quit that and then methamphetamine. His behavior became  
13   more and more bizarre. One thing that he told me is that  
14   when he -- I don't know whether it was crack or  
15   methamphetamine, but he did it with aluminum foil. And he  
16   told me the aluminum foil would just burn up, and then all  
17   he was inhaling was aluminum and that he started acting  
18   crazy. His friend started acting crazy. I was sort of  
19   skeptical about that at first until I did some research on  
20   the Internet, and I did find there is something to it. It  
21   can lead to dementia. I think in Canada they banned  
22   cooking utensils made of aluminum for that reason.

23           THE COURT: All cooking utensils?

24           MR. RASMUSSEN: I think pots and pans. I have  
25   heard that. I'm not sure of that, but there is a plethora

1 of material about the effects of aluminum poisoning.

2 Be that as it may, he became a social recluse.  
3 He had always been a neat person. He had always been  
4 organized. He had always taken care of his things. He  
5 started letting his trailer go. He started letting  
6 everything go. People would come to the door, and he  
7 wouldn't let them in because he was so ashamed of what he  
8 had become. He was a hermit and had taken drugs.

9 And he also had some experience with adult porn.  
10 You have talked about the child porn. I can tell you that  
11 the adult porn far outnumbers the child porn by a great  
12 amount. And he lost access to that because he did not have  
13 Internet access for a period, and he did not have satellite  
14 TV, although he had TV but not that kind. And that's when  
15 he was in this condition when the child started coming up  
16 and seeing her dog, and he did take advantage of that. But  
17 is he a pedophile? When the child said no, the child said  
18 I don't want to do it anymore, and he didn't do it anymore.

19 And at that time, he started to get his life back  
20 together. His first wife came by to see him. They  
21 reconnected their relationship. They started cleaning up a  
22 little bit and as bad as the house was at the time of the  
23 search, it was 100 times worse than that during this period  
24 of time. And there is a couple of things that indicate to  
25 me that he was, in fact, trying to get himself back

1 together. These are the progress notes from a VA visit,  
2 and you will notice that the date. On November 7, 2006, he  
3 has gone to the VA hospital. It talks about his past  
4 medical history, that he had mainly joint pain, lower back  
5 pain, neck pain, knee pain, wrist pain, elbow pain, and had  
6 numbness of his right side of his right leg that goes to  
7 his second toe. And the assessment and plan on page number  
8 43 says, "Chronic low back pain," and he is asked if he  
9 wants narcotics. He says he does not want narcotics at  
10 this time. This is an indicator that he is trying to get  
11 his life back together, that he is not back on drugs.

12 And another indicator -- let me just go to what  
13 you are going to deal with here. It's 15 years to  
14 30 years. And, of course, on the side of the heavier is  
15 the fact that this is a deplorable offense and that the  
16 victim is harmed. And what I ask you to look at on the  
17 other side of it is the factors which you have to deal with  
18 according to the statute, and that is his history. He has  
19 a clean record. This is the first offense of almost any  
20 kind that he has ever had. He has had numerous acts of  
21 kindness, both to people and to animals. He has served his  
22 country.

23 The issue then becomes: What about future  
24 danger? Well, this was the only time he has ever been  
25 charged with anything like this. That doesn't mean that's



1 the only time he has ever done it. But you have heard  
2 testimony that people who are pedophiles keep their  
3 trophies. They keep all kinds of stuff. I'm sure you have  
4 seen cases where you have dealt with pedophiles. They have  
5 thousands of images. These videos when they were found  
6 were dusty and dirty and had signs of disuse.

7 If you look at the ratio of adult-to-child  
8 pornography as I indicated, the ratio of adult pornography  
9 far exceeds the ratio of any child pornography. You  
10 mentioned that he had made a search for child pornography.  
11 Well, what the evidence in this trial showed -- and I would  
12 ask you to refer again to the forensic report that was  
13 introduced in evidence. I don't know if it's here or not.  
14 But I would ask you to review that, and I think what you  
15 will find is: Once the child said no, several months after  
16 that in -- I think it was in September of the year after  
17 that is when he went online one time, one time, and did  
18 those searches. And he didn't save any of those files.  
19 Those were in the temporary Internet files. They are not  
20 downloaded in his hard drive, in the permanent folder. So  
21 that was one time. That's not the sign of a pedophile.  
22 Pedophiles and people who are interested in this kind of  
23 stuff do it all the time, and he didn't before or after  
24 this one time.

25 So in addition to that, I would ask you to refer

1 to the letters that have been sent to you that indicate  
2 that not only has he done a lot of good deeds in the past,  
3 but that I expect the witnesses to testify that there were  
4 no signs that he was interested in children.

5 And then you do have the report of Dr. Aldridge,  
6 and I would refer you to the conclusions of her report  
7 where she does conclude this was more of a situation of a  
8 one-time situation. So when you talk about the bell curve,  
9 I think he fits more on this end of the bell curve than he  
10 does on this end of the bell curve.

11 There is something else to consider, which would  
12 be his medical condition. He does have a severe back  
13 disability. He suffers from a number of other conditions.  
14 For example, right now he is having terrible tooth  
15 problems. He is not getting any kind of treatment at the  
16 jail, and he was suffering from this during the time of the  
17 offense. He has suffered more now in the jail setting than  
18 he was outside the jail setting.

19 But the last thing I want to consider is the  
20 issue of -- it's not double jeopardy. It's not double  
21 jeopardy, but there is the issue of the double punishment.  
22 What the federal government punishes is the use of the  
23 Internet, the use of the materials produced in interstate  
24 commerce. That's what gives us jurisdiction. The state  
25 has also charged him with the offense of abusing the child.

1 And you know that we have made efforts to try to settle  
2 that, and they simply won't settle it. They do want to  
3 prosecute him.

4 I know typically that you are leery of, well,  
5 that's up to the Judge in the future. That's not up to me.  
6 That's up to the Judge in the future. But I suggest it's a  
7 factor to be considered when you talk about: What is the  
8 federal crime here? The federal crime here is the use of  
9 interstate commerce.

10 And also one factor which we will ask for later  
11 on, whatever your sentence is, I know he is borrowed from  
12 the state for the prosecution, but I think you should give  
13 some consideration to the fact that he has been in jail for  
14 this because it is for the same conduct.

15 So what I submit to Your Honor based upon all  
16 this that he is not in this bell curve over here at this  
17 end where the worst offenders are. He is more at this end,  
18 and that's where I think he should be sentenced as well in  
19 this range from 15 to 30 years. I do have some witnesses  
20 to call. Do you want me to call them at this time?

21 THE COURT: Yes, if they will just stand up.  
22 They can stay where they are, but they all need to be sworn  
23 at one time. They need to raise their hands and take the  
24 oath of a witness.

25 MR. RASMUSSEN: He has difficulty standing, Your

1 Honor.

2 THE COURT: You can remain seated. That's  
3 perfectly fine, sir. Raise your right hand.

4 (All witnesses were sworn.)

5 THE COURT: Ms. McBurnette, good morning.

6 MS. McBURNETTE: Well, Tracy was a very good  
7 son. When he was growing up, he was the person that helped  
8 me. We always had projects. We painted the house one  
9 year, both of us. He mowed the lawn. He took care of the  
10 odds and ends while his dad worked. He was very good. He  
11 tried to help out at home, and he was a very good son. He  
12 went to school. He was very bright in school. At times he  
13 didn't have enough to do at school.

14 He was with the FFA. That was one of the best  
15 times and most memorable times that I remember him, one of  
16 my favorite times being with him. He had not played guitar  
17 before. And when he started up with the FFA band, one of  
18 his teachers was a person that I went to school with. So  
19 he gets off the school bus one day, and he has some cymbals  
20 and a rubboard. So that was his part in the band, to play  
21 the rubboard. And then he picks up an old crockery jug  
22 that I had, and he started playing that, and then he  
23 decided he wanted to play the guitar. Within two months,  
24 he was playing guitar with the band. They did win first  
25 place, FFA, in Montgomery. And they did so for three

1 years, and that was a wonderful time. He was a very good  
2 son.

3           When my husband took sick, Tracy had moved to New  
4 Mexico some months prior to that. And, obviously, it was a  
5 very difficult time, very trying time, and he helped. We  
6 would go for chemotherapy in Denver and later on to  
7 Albuquerque. And from where we lived, that would be a  
8 four- or five-, six-hour drive. And when I would get in at  
9 night when we would come in at 11, 12, 1:00, everything  
10 would be done at the house. The house would be warm. The  
11 animals would be fed. Everything would be clean and taken  
12 care of. Everything was fine, so that I could get my  
13 husband in and get him back up, and we went through that  
14 together. It was a very difficult time. He was a very  
15 good son.

16           He loved his grandmother. His grandmother broke  
17 her hip, and she did not recover from her hip being broken  
18 so she went to a nursing home. She was there five years.  
19 He would go down and tend to her, and he would tend to her  
20 at any time that he had an opportunity. He loved her very,  
21 very much. And she lived to be 97 years old. We had her  
22 here a long, long time.

23           And he was always a very good son to me. And  
24 when this all happened, it was such a shock to me. I knew  
25 that there was a mistake. Something had happened. It

1       could not have been my son. That was not my son.

2               MR. RASMUSSEN: Ms. McBurnette, let me ask you  
3       this: Growing up and in his early adulthood, what was his  
4       hygiene like?

5               MS. McBURNETTE: Oh, he was very, very clean. He  
6       showered all the time. He kept his cars perfectly clean.  
7       The car was washed every day.

8               MR. RASMUSSEN: And when he moved back to  
9       Alabama, were you all in Alabama?

10              MS. McBURNETTE: Yes, I was back in Alabama. He  
11      lived there with me from about 15, 16 months before I left.

12              MR. RASMUSSEN: And you moved out to where?

13              MS. McBURNETTE: I moved to El Paso.

14              MR. RASMUSSEN: At that time, was he still a neat  
15      and clean person?

16              MS. McBURNETTE: Absolutely.

17              MR. RASMUSSEN: Was there a time when you came  
18      back to Alabama?

19              MS. McBURNETTE: Yes. I would come back from  
20      time to time.

21              MR. RASMUSSEN: After you started coming back,  
22      did you get to see inside the house?

23              MS. McBURNETTE: I did the first couple of times,  
24      and I didn't see anything wrong. And then it got to where  
25      he would -- if I would need things from the house, he would

1 bring them to me, and then I realized that he really didn't  
2 want me to go over there.

3 MR. RASMUSSEN: Now, after he was arrested, did  
4 you come back down?

5 MS. McBURNETTE: Yes.

6 MR. RASMUSSEN: Did you see the house?

7 MS. McBURNETTE: Yes.

8 MR. RASMUSSEN: What was your reaction when you  
9 saw the house?

10 MS. McBURNETTE: Shock, absolute shock. I  
11 couldn't believe it.

12 MR. RASMUSSEN: Why was that?

13 MS. McBURNETTE: It was a new house and it was --  
14 the carpets were torn. The Sheetrock was torn. It was  
15 chewed up by the dogs. The furniture was chewed up. It  
16 was filthy. It looked like it had a quarter-inch of dust  
17 on it. It smelled horrible.

18 MR. RASMUSSEN: Was that consistent with what you  
19 had thought your son to be?

20 MS. McBURNETTE: Oh, no. Not at all, no. That  
21 couldn't possibly happen, couldn't possibly happen.

22 MR. RASMUSSEN: Is there anything else you would  
23 like to tell the Judge?

24 MS. McBURNETTE: Well, Tracy was always a good  
25 son. He didn't get into trouble. He was a kid, and then

1 he grew up, but he was a good son. He worked hard. He  
2 tried to help. He tried -- he was a member of the family.  
3 When his dad was sick, I don't think I could have made it  
4 without him. I guess I would have. I always seem to  
5 manage, but I don't know how. He was very good, and he  
6 always tried to take care of me. He tried to take care of  
7 his grandmother.

8 MR. RASMUSSEN: Thank you.

9 THE COURT: Thank you.

10 Any questions, Mr. Fortune?

11 MR. FORTUNE: No, Your Honor.

12 MR. RASMUSSEN: Susan, would you come and tell  
13 the Court your name.

14 MS. ROBERTSON: Susan Robertson.

15 MR. RASMUSSEN: Tell us how you came to know  
16 Tracy.

17 MS. ROBERTSON: I met Tracy when I was about 19  
18 years old. He was a friend of my sister's boyfriend. And,  
19 you know, when I first met him, he was just not my type.  
20 And then after going out a couple of times, he was, you  
21 know. We were together for about 14 years. He was never  
22 abusive.

23 We did do a brown pelican rescue at one time, and  
24 that was my first experience with rescuing animals. It was  
25 pretty amazing, you know. And just being there together as



1 a couple doing this was unique.

2 I have a little sister and three nieces, all at  
3 that time when we were seeing each other, young, and they  
4 spent a lot of time around us. There was never anything at  
5 all inappropriate, and we were a family. We were a unit,  
6 you know. I don't think that this is something that he  
7 would ever do again because it's not something that he  
8 would have done normally to start off with. It was a  
9 mistake. And everybody should get one mistake that they  
10 aren't convicted for life, you know, on.

11 MR. RASMUSSEN: Did you live with him in New  
12 Mexico?

13 MS. ROBERTSON: Yes.

14 MR. RASMUSSEN: Did he take part in animal  
15 rescues there, too?

16 MS. ROBERTSON: Yes, he did.

17 MR. RASMUSSEN: Was it just dogs or pelicans?

18 MS. ROBERTSON: No, we had several dogs. Big  
19 Brown, she was an abused dog that we took from this guy who  
20 was a jerk. And then there was a horse that he took from  
21 this guy that just neglected it. And we brought it to the  
22 house, and the horse didn't like him. It bit him, but he  
23 took care of him, you know.

24 And there was several -- when we first moved into  
25 our house, there was probably about 25 wild cats that we

1     went out of our way to trap and bring to get fixed and  
2     vaccinated. And to this day, there is still probably -- I  
3     think there is probably only about four left because they  
4     have all kind of went their -- you know, died.

5             MR. RASMUSSEN: That's all.

6             Do you have any questions, Your Honor?

7             THE COURT: Why did you leave him? Let me put it  
8     this way: The report from his psychologist, or the doctor,  
9     says that he told her -- it's on page 9: "He spent about  
10    12 years with Susan Robertson, and he said she left him  
11    because of his mood swings and depression."

12            MS. ROBERTSON: Yes. He required a lot more care  
13    than I could give with the expense -- I was putting in so  
14    much that I was losing myself, so I had to step back.

15            THE COURT: Okay.

16            Anything from you, Mr. Fortune?

17            MR. FORTUNE: What years, what was the time frame  
18    of your relationship?

19            MS. ROBERTSON: I was 19 when we first met, and I  
20    think I was 34 when we split up. It was 14 years.

21            THE COURT: We are trying to find out when that  
22    was. We don't know how old you are.

23            MS. ROBERTSON: I'm 42.

24            THE COURT: So go back 23 years from 2009, and  
25    that will get you the beginning of the time frame.

1 MS. ROBERTSON: That sounds about right.

2 MR. FORTUNE: All right. Thank you.

3 MR. RASMUSSEN: And, John Alexander, you can come  
4 if you want to or you can stay there.

5 THE COURT: Good morning.

6 MR. ALEXANDER: I can't add anything. All I can  
7 do is tell you that --

8 THE COURT: Your name, sir?

9 MR. ALEXANDER: John E. Alexander.

10 THE COURT: How do you know Mr McBurnette?

11 MR. ALEXANDER: I have known him since he was  
12 about 6 years old. He went in the Navy when he was of age,  
13 I suppose, and stayed for quite a few years. I didn't see  
14 him then. Of course, he lived in New Orleans and Texas and  
15 New Mexico, and I didn't see him then. I only saw him  
16 again when he came back here to Alabama, but he was  
17 attentive to me. I had knee surgery, and he would take  
18 care of me. And I did enjoy watching him with his  
19 grandmother. He was very attentive to his grandmother and  
20 his mama.

21 But like I say, I can't add anything to what they  
22 say. I can only tell what I saw, and I enjoy his company.  
23 He would make sure that we would go eat two or three days a  
24 week, and it helped me a lot.

25 THE COURT: Thank you.

1 Any questions, Mr. Fortune?

2 MR. FORTUNE: No, Your Honor.

3 MR. RASMUSSEN: Your Honor, one other thing I  
4 want to bring up that I think I sort of skipped in the  
5 PowerPoint: This is a newspaper article where somebody  
6 wrote in the newspaper commending Mr. McBurnette for his  
7 honesty. He had found a wallet of this gentleman and  
8 returned to this gentleman. He was so impressed that he  
9 wrote to the newspaper about it. And it's consistent with  
10 Mr. McBurnette's tendency for acts of kindness not just to  
11 animals but to people as well, notwithstanding what he did  
12 during the course of this offense.

13 That's all I have, except that I would like to  
14 make sure that Ms. Aldridge's report is an exhibit as well  
15 as received, and I think I have a copy of that.

16 THE COURT: Yes. Mine has writing all over it.  
17 It would be Defendant's Exhibit No. 3, and it's admitted.

18 MR. RASMUSSEN: Your Honor may also recall --

19 THE COURT: Are you including her CV?

20 MR. RASMUSSEN: Yes.

21 THE COURT: Just make it all one composite  
22 exhibit.

23 MR. RASMUSSEN: During the course of the trial, I  
24 believe the Government showed some pictures of his house  
25 and the disrepair that it was in, and that is reflective, I

1 think. The deterioration of his house is reflective of the  
2 deterioration of his mind during that period of time, which  
3 is illustrated by the fact of what it had been like before  
4 that. I just want you to take that into consideration. I  
5 do have some pictures.

6 THE COURT: Yes, I remember that. I also  
7 remember Debbie Barnett's testimony of the motion to  
8 suppress where she said that she sat in the chair, and the  
9 urine from the dogs from the chair soaked through her  
10 clothes. I remember that. It's hard to forget.

11 MR. RASMUSSEN: There is one other factor. It is  
12 sort of just a nonfactor. I think the prosecution at one  
13 time referred to some children's books that were found at  
14 the residence, and Ms. McBurnette will tell you, I think,  
15 those were her books.

16 MS. McBURNETTE: I believe that those books were  
17 my children's books that had been brought from New Mexico.

18 THE COURT: Does your client wish to say  
19 something himself?

20 THE DEFENDANT: Yes, ma'am.

21 MR. RASMUSSEN: He would like to say it from  
22 there because he would like to address the family as well.

23 THE COURT: All right. We need to put him under  
24 oath.

25

1                   **MARTIN TRACY McBURNETTE,**  
2       called on behalf of the defense, having been first duly  
3       sworn, was examined and testified on his oath as follows:

4       **EXAMINATION BY THE COURT:**

5           A       I wanted to clarify one thing before I get  
6       started.

7           Q       State your name for the record, please.

8           A       My name is Martin Tracy McBurnette. I just  
9       wanted to mention that nobody saw my house the way it was  
10      before I let anybody come over. The first person that come  
11      over was my ex-wife Tammy. I finally let her in because I  
12      knew I needed some kind of help. But before she made it  
13      over, I cleaned up my house with a snow shovel and a rake.

14          Q       Which time frame are you talking about now?

15          A       This was near the end of when I was doing drugs  
16      and stuff.

17                   It was literally ankle deep in filth. Anyway, I  
18      wanted to clarify that. And I've got two publications I  
19      just wanted to read a couple of short excerpts out of.  
20      They are both spiritual publications, and I have a couple  
21      notes here.

22                   When I was taken to jail on November 9, 2007,  
23      Investigator Jones suggested that I do a lot of soul  
24      searching. It was good advice, and I spent my time in  
25      suicide watch doing just that. And on November 14, 2007, I

1 just fell to my knees and I asked God to please help me.  
2 He responded by allowing me to receive his Holy Spirit, and  
3 I repented my sins and I accepted Jesus Christ as my savior  
4 at that point. But I still had a lot of questions, as did  
5 everyone else that knew me. What happened? What happened  
6 to Tracy? What happened that he could do such a terrible  
7 thing and hurt people that he loved, people that he had  
8 known practically his whole life? How could he hurt a  
9 child?

10 When I finally got my hands on the Bible, I  
11 started reading, and I started getting some answers. My  
12 Aunt Jeanne recommended I read the book of Romans, and I  
13 read in there about how we are all born with a sinful  
14 nature that we are always battling against and that without  
15 your good judgment and common sense and without God's holy  
16 spirit, the devil will be able to use you for his own evil  
17 purposes; and anything that affects your good judgment puts  
18 you on a path to destruction.

19 I was exposed to sex and pornography at a very  
20 young age, not in my home but outside my home. My whole  
21 life could not have been better. I could not have had a  
22 better family or parents. Many years later I found myself  
23 alone in New Mexico when Susan and I had broke up. And it  
24 was my fault because it sure could not have been Susan's.  
25 I found myself with a lot of time in the middle of nowhere,

1 and I started looking at things on the Internet that I  
2 shouldn't have, and that's when I first started turning to  
3 drugs and alcohol in a serious way.

4 In this one publication it says, "When a person  
5 thinks bad thoughts, he nurtures wrong desires. These in  
6 turn may lead to harmful acts. For example, casual  
7 interest in pornography may develop into an obsession with  
8 sex that impels a person to act on his fantasies, perhaps  
9 in a criminal way."

10 When I moved back to Alabama, I was trying to  
11 escape what I was in in New Mexico and get back into some  
12 kind of social life, some kind of routine. And I wanted to  
13 fit in so badly with everyone. My reputation as a  
14 do-gooder or whatever had preceded me. Everyone kind of  
15 expected me to be a stick-in-the-mud, so I was going to  
16 show them different. So I was willing to disregard the  
17 warnings from my family and the good advice from friends I  
18 had all my life and my own better judgment. And I  
19 participated in things that I shouldn't have, things that I  
20 knew better.

21 And it wasn't just what we smoked. It was how we  
22 smoked it. Mr. Rasmussen indicated we smoked  
23 methamphetamine on aluminum foil. And when you run out of  
24 the particular aluminum foil that you are supposed to use,  
25 you kind of break down and get some thin aluminum foil, and



1 it burns through. And when it burns through, you smoke the  
2 aluminum. And I later learned that smoking aluminum causes  
3 aluminum toxicity, and that causes mental problems, and I  
4 didn't know that at the time.

5 And I expressed my concerns to the guys I was  
6 partying with that we had to stop doing it, at least that  
7 way. I got that information from a friend of mine who sent  
8 it to me. She got it from Medicinenet.com.

9 It says here, "It is extremely difficult for any  
10 person to make significant behavioral changes or lifestyle  
11 modifications. When changes do occur, they are usually  
12 preceded by some major conflict or trouble. When mood- and  
13 mind-altering chemicals enter the picture, the degree of  
14 difficulty is greatly multiplied. Chemicals affect the  
15 brain, distorting our thoughts, and therefore dictating  
16 unacceptable behavior.

17 "One may be addicted to nicotine, alcohol, pot,  
18 cocaine, heroin, or food, gambling, lying, cursing, sex,  
19 pornography, work, resting, exercise, TV, overspending,  
20 sports, controlling others, et cetera. Please don't  
21 misunderstand. There is an extra and very potent  
22 ingredient involved when a chemically addictive substance  
23 is part of the equation due to biochemical changes in the  
24 body and especially in the hijacked brain.

25 "Also, there is an undeniable difference in the

1 consequences that result from lawless acts committed under  
2 the influence. It is not an excuse. It's just a hard  
3 reality of the situation. How many have said I never would  
4 have done that if I had not been stoned? Truthfulness is  
5 not in question. However, the fact is I was stoned, and I  
6 am responsible and I'm now going to suffer certain  
7 consequences as will all my victims."

8 Q Are you reading or are you saying this yourself?

9 A I read just that part out of this publication.  
10 Now I'm back to my notes.

11 Q Okay. You are not maintaining you were stoned,  
12 were you?

13 A I was taking drugs at the time, yes, ma'am,  
14 absolutely. I was since the time I moved back to --

15 Q I'm talking about at the time you produced the  
16 videotape that you were convicted for. Were you saying you  
17 were stoned?

18 A I had a drug habit, yes, ma'am. When I first  
19 moved back, I turned it down several times, but I finally  
20 gave in, but that was very soon after I moved back.

21 I would like to apologize to [redacted] and her  
22 family for the untold pain and suffering and anguish that I  
23 have caused you, for throwing your once peaceful lives into  
24 utter turmoil, for destroying our relationship that took  
25 decades to build, and for betraying trust that required

1 decades to earn.

2 I want to apologize to my family and my friends  
3 for the undeserved hell that you have had to endure.

4 I want to thank God for my family's unwavering  
5 courage, prayers, love, and support. Some have traveled  
6 great distances, and some have come in great physical pain  
7 in order to be present on my behalf, and some like my mom  
8 have managed somehow to do both.

9 I also want to thank God for the best attorney in  
10 the form of Michael Rasmussen that anyone could ever have  
11 at any price, one who believes in me despite some very  
12 difficult circumstances.

13 I want to apologize to the court and to Your  
14 Honor, the prosecutor's office, and the district attorney's  
15 office, and the American taxpayers for having consumed  
16 time, energy, and other resources that could have been used  
17 elsewhere.

18 And I'm sorry that I couldn't sign a plea  
19 agreement. I wanted to. But the length of the possible  
20 sentences, the fact that I had state cases pending, and the  
21 question of whether or not they would be run concurrently  
22 or consecutively rendered it impossible for me to sign a  
23 plea agreement. I couldn't provide any substantial  
24 assistance because I just don't know anybody or of any  
25 activities of any criminal significance.

1           When I was very, very young, one of my first  
2       memories when we were living in Rainbow City is that my  
3       neighbor had a dog and she had puppies. And one Sunday  
4       morning Mom had me dressed up to go to church. And he  
5       said, "Do you want to see the puppies?"

6           And I said, "Yes. Can we go see the puppies?"

7           So we went and saw the puppies. We went back  
8       several days later, and that's when we realized that on our  
9       previous visit we had inadvertently locked the door. The  
10      mom couldn't get to them to feed them, and all of them  
11      except two of them died. It affected me in a way that I  
12      can't really explain, and it's caused problems for me later  
13      in life. I became obsessed. Since I couldn't bring the  
14      puppies back, I spent the next 40 years trying to bring  
15      those puppies back to life. Couldn't do it.

16           So I became obsessed with the next best thing,  
17      which was to save as many others as I could save. And I  
18      promised each one as I rescued them that they would never  
19      suffer again. And the only way I can do that in my mind,  
20      the only way I can make sure they weren't chained up or  
21      starved or left out in the cold or beaten was to keep them  
22      myself.

23           And things went okay for a while, and I would  
24      take rescued animals down to the nursing home where my  
25      grandmother was, and it was a mutual beneficial thing for

1 everyone, the animals, the people, and for me, very  
2 rewarding. But as they grew in number, it became more and  
3 more difficult for me to leave them alone and run even the  
4 simplest of errands like going to get food for them or  
5 myself. And I believe that I isolated myself in such a  
6 manner that contributed to my succumbing to evil desires  
7 and to my acting in a criminal manner.

8 With my last ounce of willpower and with the help  
9 of my ex-wife, Tammy, I managed to stop doing drugs. I  
10 stopped drinking. I stopped looking at pornography. I  
11 started pounding the vitamins, and I was trying to detoxify  
12 myself. And, slowly, as my mind began to clear, the  
13 reality and the horror of what I had done began to sink in.  
14 And the thought of it tore at me every day and night. It  
15 was the first thing I thought of when I woke up in the  
16 morning, and it was the last thing I was thinking of when I  
17 tried to go to sleep at night. No one is in more shock and  
18 disbelief over what I have done than I am, and no one hates  
19 me more for what I've done than I do. I wanted so  
20 desperately to undo what I had done; but, of course, that  
21 was impossible.

22 Again, I tried to do the next best thing and  
23 confess my sin, and I went over to [redacted] father's  
24 house. I went over to Jeff's house one night, and I had  
25 mama dog with me. It was a dog that me and him had rescued

1 together. We rescued her and all her puppies. And Jeff  
2 was my hero for that, and I told him so. And I was going  
3 to tell him what I had done, but I didn't have the guts.

4 Later on I saw [redacted] walking with the cows  
5 out in Mr. Little's pasture, which is next door to my  
6 house. So I went outside and went over to the fence and I  
7 called over to the fence, and I told her how sorry I was,  
8 how sorry I was that I had hurt her. And I begged her to  
9 forgive me. She said, "You didn't hurt me."

10 Of course, she didn't know that I had hurt her  
11 very badly.

12 I'm begging you for your forgiveness, and I'm  
13 asking for help. I'm reading from a publication now that  
14 says, "In God's eyes, no one is automatically a lost  
15 cause."

16 Q What publication is this, sir?

17 A It's from Awake. "In God's eyes, no one is  
18 automatically a lost cause. God's son, Jesus Christ, said,  
19 'I have come to call not righteous persons but sinners to  
20 repent.' It is true. Adjusting to living by Bible  
21 standards may be a challenge, but success comes to those  
22 who are patient and who take advantage of the help God  
23 provides, including the loving support of spiritually  
24 minded Christians."

25 And God has provided me that support of

1 spiritually minded Christians in the form of my friends and  
2 family.

3 "When honest-hearted ones gain knowledge of the  
4 true God, they deeply regret their past wrong and are moved  
5 to express heartfelt repentance. Simply put, a person  
6 shows by his new way of life that he really means it when  
7 he says I'm sorry. It is true because of imperfections and  
8 weakness even genuine Christians sin, sometimes seriously.  
9 But their failings do not reflect an entrenched evil  
10 disposition. It's not only the sin but also the attitude  
11 of the sinner that Jehovah God knows. We can be sure,  
12 then, that both Jesus Christ and his Father will show  
13 compassion toward all who manifest true repentance  
14 regardless of their past deeds."

15 Back to my notes, my number one prayer will  
16 remain as it has been for so long, for our God to bless and  
17 heal [redacted] and the broken hearts of all those I have  
18 hurt so deeply. I also pray that my true character will  
19 not be forgotten by those who know me. And that it will  
20 become apparent to those who don't in the holy name of  
21 Jesus, amen. Thank you.

22 THE COURT: You are welcome.

23 Any questions?

24 MR. FORTUNE: No, Your Honor.

25 THE COURT: You may step down.

1 Anything else, Mr. Rasmussen?

2 MR. RASMUSSEN: No, Your Honor.

3 THE COURT: Anything from the Government?

4 MR. FORTUNE: Yes, Your Honor. At this time, the  
5 Government would call Brenda Chapman, the mother of BC, the  
6 victim in this case.

7 **BRENDA CHAPMAN,**

8 called on behalf of the Government, having been first duly  
9 sworn, was examined and testified on her oath as follows:

10 A Let me see if I can do this. This is hard.  
11 Sitting here today and listening to the things that have  
12 been added, my mind flashes through the last 20 years of  
13 growing up with Tracy and his mother. I remember her  
14 burning us up with chili, me and Kelly. I have fond  
15 memories of growing up with them. They were a part of our  
16 family. His sister was my best friend. My brother was his  
17 best friend. They were good people. They treated us good.  
18 I never had any complaints.

19 They have talked about the drugs they did or  
20 didn't do. I can remember riding to school, and I remember  
21 Tracy and Dale and them smoking pot from high school days  
22 at the tree. And I remember them partying at the creek.  
23 Bear Creek, I think, is what they used to call it, and they  
24 have done drugs since high school days, you know. And I  
25 fell in there right behind them. So I know the people that



1 he ran with then.

2           Years ago I made changes in my life regarding my  
3 daughters and my family, the life I wanted to live and what  
4 I wanted to give them, and drugs was not part of it. And  
5 it contributed to me not doing drugs. It contributed to  
6 the divorce of [redacted] daddy because he did continue to  
7 smoke. And he was friends with Tracy and a few other ones,  
8 and I know they partied together from day one that they was  
9 out there.

10           And Tracy and his love for animals has been as  
11 long as I remember. And I can remember my daddy shooting  
12 one of his dogs with buckshot and me jumping my daddy for  
13 it. I said, "You didn't have no right to do that, you  
14 know."

15           If Tracy's animals got loose, I would call him.  
16 Gizmo is loose, the so-and-sos are loose, whatever. He  
17 never hardly ever answered the phone. But a minute or two  
18 later I would see him in the truck going down the driveway,  
19 and he would go get them. He is probably the only reason  
20 why I spay and neuter my animals, the influence he had  
21 because of the love that he had for animals. He did  
22 positively influence me in that, but my daughter is not an  
23 animal. My daughter was 7 1/2 years old and had been  
24 taught to trust him through her parents and us because I  
25 trusted him. And I allowed her to go down there because

1 that was part of the agreement that we had, was when we  
2 talked her into letting her give Gizmo to him because he  
3 was too much of a dog. He was too massive. He literally  
4 yanked her right out of the swing-set because he was so big  
5 and just playful and hyper. She couldn't handle him. She  
6 was too small and he was too big. And the deal was that if  
7 he took him, that she could go see him and play, and that  
8 was fine. So when we wanted to go, we would always call.  
9 Can she come down, or she would call. "Mama, can I call  
10 Tracy to see if I can go see Gizzy?" Yes, I didn't fear  
11 it. Why? Why should I? Why should I fear her going to  
12 see him or the dog?

13 But I can tell you the memories that I have now  
14 of watching him do what he did to my daughter will haunt me  
15 for the rest of my life. I dream it. I see what he did to  
16 her, and I can't find that spot in my heart yet to forgive  
17 him for what he did. To see her sitting in that recliner  
18 and her feet not even touching the floor and the back of  
19 that chair so big and her so small sitting there and her  
20 just twiddling her hands and looking around, it's like she  
21 sensed that she knew something. And to hear him after the  
22 little part with the blindfold to tell her you come back  
23 and see the birds tomorrow just to get her back down there  
24 for a little more from my 7 1/2-year-old daughter who  
25 just -- like I told you, she has no childhood memories

1 anymore. Those are her memories, and that is what is going  
2 to stand out in her head. And I'm doing everything I can  
3 do to change that. She is getting counseling. She is  
4 still involved in Girl Scouts, and we talk about the good  
5 deeds that he has done for the animals.

6 Are you aware that [redacted] saved Mr. Little's  
7 life that year, that his house was on fire and she banged  
8 on the door? She also earned the Bronze Cross Award for  
9 the Girl Scouts. She was front page of *The Gadsden Times*  
10 for saving that man's life at 8 years old. So she's done  
11 her positives, too.

12 All of us have been so affected by it. She  
13 sleeps with a bat. She used to go out in the yard at  
14 nighttime, and just turning the porch lights on would be  
15 enough. And she would go out in a fenced back yard. She  
16 won't do that anymore. She won't stay by herself in the  
17 house. When it starts getting dark, I have to make sure  
18 that somebody is there. Either she goes to Papaw's or  
19 Lindsey or her sister. Somebody is there because she don't  
20 like to be alone anymore. She don't like to be in the  
21 house when it's dark, and she has been affected.

22 No matter how she expresses it in her way, it's  
23 there. And it's going to continue to come out the older  
24 she gets. And I hope and I pray every day that the  
25 counseling that she is receiving will be enough, will be

1 effective that I can be a positive impact on her now to try  
2 to lead her and to give her what she needs so that one day  
3 her husband and children, just like I said there, don't  
4 have to carry the burdens of her childhood because it's  
5 going to impact how she raises her kids, how she treats her  
6 husband.

7 And she is only 11 years old now. She has the  
8 rest of her life. If she lives to be 80, she will carry  
9 her sentence, as I worded it, for 73 1/2 years. His 15 to  
10 30, 15 to 30 years is not enough to me. It's not enough  
11 for her because she, minimum, gets 70 years that her  
12 sentence will be because those scars for her will never go  
13 away. They will never go away for us, her immediate  
14 family, or her children, either.

15 I don't know what else to say. There's more, but  
16 it just can't come out, you know. But I do know that  
17 Ms. Mac, is what I have always called her -- Ms. Mac, they  
18 were good people and he was raised right. And Neeny, his  
19 grandmother, I remember her because I used to go and eat  
20 cookies with her, you know. They were good people. They  
21 don't deserve it no more than we do.

22 THE COURT: Any questions, Mr. Rasmussen?

23 MR. RASMUSSEN: No, Your Honor.

24 MR. FORTUNE: Your Honor, the Government has  
25 already filed an extensive written response, which is

1 document 70, in regard to argument for sentencing, that  
2 30 years in prison followed by lifetime supervised release  
3 is a fair and reasonable sentence. In regards to some of  
4 the arguments presented by defense counsel as well as his  
5 witnesses, Your Honor, one mistake is forgetting your keys.  
6 One mistake is running a stop sign that you didn't see.  
7 This defendant methodically groomed this child,  
8 methodically stalked this child, preyed upon this child,  
9 and manipulated her. His planning was clear and his  
10 interest -- Defendant's Exhibit 3 is, I believe, the  
11 defendant's expert and psychologist and her psychological  
12 evaluation of the defendant. And I would ask the Court to  
13 review that specifically and give it the weight that it  
14 deserves.

15           Throughout that evaluation, what stands out to  
16 the Government is that there is no mention of his obsession  
17 with child pornography. There is references to  
18 pornography, but there is absolutely no reference or  
19 analysis or taking into consideration this defendant's  
20 obsession with child pornography. Defense counsel just  
21 stood up here and indicated that it was a one-time search  
22 for child pornography. The other witness wants to  
23 reference that this was a one-time mistake. The evidence  
24 clearly shows that that is not true, Your Honor. Those  
25 arguments are without merit. Specifically, what were

1 introduced as Government's Exhibits 40 and 41 at the time  
2 of trial -- I would like to mark these as Government's  
3 Exhibit A and Government's Exhibit B -- these are the  
4 notable typed URLs and notable Internet history reports  
5 that were conducted by the computer forensic examiner.

6 And even at trial, the defense attorney's expert  
7 did not dispute any of this, these results -- did not  
8 dispute that both the laptop as well as the desktop  
9 computer that was in disarray were both used to actively  
10 search for and find images of child pornography. The issue  
11 was whether the Modified Access Creation Date, whether the  
12 MAC dates, were reliable in regards to the time frame. And  
13 the defense expert indicated and testified that those  
14 Modified Access Creation Dates were reliable, and his  
15 testimony was that all of this searching and looking for  
16 child pornography occurred in 2004, years before the actual  
17 victimization of this child.

18 Your Honor, if I may approach with what will be  
19 marked as Government's Exhibit A and Government's Exhibit  
20 B. I'm using letters since defense attorney used numbers.

21 THE COURT: That's fine. I have seen them. They  
22 were introduced at trial, but you are welcome to  
23 reintroduce them. They are admitted as Government's  
24 Exhibits A and B. I was there.

25 MR. FORTUNE: Your Honor, in regards to the

1 search terms which were introduced at trial for  
2 demonstrative purposes, that were not actually introduced  
3 into the record but were introduced as Government's Exhibit  
4 39 at the time of trial -- I would like to mark this as  
5 Government's Exhibit C -- these are the Internet search  
6 terms and summary --

7 THE COURT: I was at trial, Mr. Fortune. I heard  
8 everything that was said. You are welcome to introduce  
9 them, but I remember what was done during the trial.

10 MR. FORTUNE: Your Honor, what I would note is  
11 specifically numerous different dates and numerous  
12 different times that this defendant was using both  
13 computers to actively search for child pornography. His  
14 interest in child pornography spans much more than just one  
15 incident, one accident, one mistake.

16 In regards to the video evidence that was  
17 introduced at trial, the Court once again was at trial and  
18 recalls that this wasn't just one day where all of this  
19 occurred. There was a grooming process, and it was  
20 plotting and planning even to the effect of him going and  
21 having two cameras: One, so he could see what the child  
22 was watching on TV; and, two, so he can see the child's  
23 reaction as she was watching images of adult pornography.  
24 And even furthermore, he took the time to plot and plan and  
25 put a dollar bill in the middle of the room, filmed this,

1 and tell the child "I'm going to take a shower, make sure  
2 you don't bring any of the dogs in the house." The  
3 evidence clearly showed the defendant manipulated the money  
4 so it was clearly within the frame of the shot.

5 After this defendant sodomized this child -- and  
6 the Court saw that; we saw that at trial -- after he  
7 sodomized this child, he then used his previous setup, his  
8 previous grooming, to try to hide his sodomization of this  
9 child by saying, "I was looking through the video, and you  
10 know what? That day when I took the shower and I told you  
11 not to bring any dogs in the house, I must have left the  
12 tape running accidentally, and guess what I saw. I saw you  
13 bring the puppy in the house. You don't tell about our  
14 little secret. I won't tell about your bringing the puppy  
15 in the house."

16 That's not a man who made one time mistake.  
17 That's a man who thought and planned and methodically  
18 thought about how he was not only going to victimize this  
19 child but how he was not going to get caught. Think about  
20 the actual sodomization act, Your Honor. There was a  
21 syringe. There was a cucumber. There was a sauce. What  
22 were all those for? How long did it take him to think  
23 about what would simulate or what would act as if a male  
24 ejaculated in your mouth to cover that up? The blindfold,  
25 this was something that -- and the Court has witnessed his



1 testimony. He is a very smart man. He is a very  
2 intelligent man. He planned on how he was going to abuse  
3 this 7 1/2-year-old child, Your Honor. That's what he did.  
4 Not a one-time mistake. He thought, he planned.

5 The United States sentencing guidelines do have a  
6 pendulum, does take into effect the ranges, et cetera, of  
7 15 to 30 years. For the least offender, it begins at 32, a  
8 presumptive 32. But then there are additional  
9 circumstances, additional things that the sentencing  
10 guidelines take into effect. Given the nature and conduct  
11 of this defendant's actions in this case, which gives us --  
12 we go from a baseline pendulum of 32 all the way to a level  
13 of 43 giving the sentencing guidelines and recommendation  
14 of life, Your Honor, because the sentencing guidelines take  
15 into effect everything that he did and appropriately  
16 recommend the maximum of 30 years followed by lifetime  
17 supervised release, Your Honor.

18 If I may approach with Government's Exhibit C?

19 THE COURT: The search terms?

20 MR. FORTUNE: Yes.

21 THE COURT: It's admitted.

22 MR. FORTUNE: Your Honor, also the Court is aware  
23 that the Government at the time of trial introduced what  
24 was marked then as Government's Exhibit 43 that were actual  
25 printouts of the images of child pornography that were

1 found on this defendant's computer. I will defer to the  
2 Court's discretion. If the Court needs to review those  
3 images, I have those images, some of those images, Your  
4 Honor, his search terms were for 10-year-old children.  
5 They depict children around the same age as this victim  
6 that he produced the actual images of child pornography  
7 with, Your Honor. And they also show sadistic type of --  
8 they show actual penetration. They even show some  
9 bounding, Your Honor.

10 It is clear given the plotting, the planning, the  
11 sophisticated nature for which this defendant planned on  
12 how he was going to sodomize this child, then sodomized the  
13 child and then planned on how he tried not to get caught  
14 that he deserves the maximum by this Court. The Government  
15 is asking that the Court impose a sentence of 30 years  
16 imprisonment followed by lifetime supervised release in  
17 addition to the terms and conditions recommended in our  
18 filed written report. That does include the registration  
19 as a sex offender.

20 MR. RASMUSSEN: May I have a brief response, Your  
21 Honor?

22 THE COURT: Okay.

23 MR. RASMUSSEN: I'm not here to defend his  
24 conduct, but I just point out that what I was referring to  
25 in my opening was a laptop and what happened afterwards not

1     what happened before. What happened before is also a one  
2     time. I just want to clarify one thing about when you were  
3     questioning him: I don't think he meant to say that when  
4     he was doing this offense he had drugs in him at that time.  
5     I think he would say that to you now. He wasn't smoking  
6     something that day. And the only issue now, though, is --  
7     again, I'm not defending what he did. The question is:  
8     What now? What now? And you have actually handled more of  
9     these cases than I have, and you are the best person to put  
10    these in the context of all the other cases and give an  
11    appropriate sentence, and we rely upon you to do that.  
12    Thank you, Your Honor.

13                 THE COURT: Thank you, Mr. Rasmussen.

14                 I have heard a lot today. And I have heard to  
15    summarize why the defendant says he should get a sentence  
16    in the low end of the guidelines. I can summarize it.  
17    First of all, he says he lost his props. He didn't have  
18    any friends anymore. He didn't have anybody to prop him up  
19    and pick him up when he was down. Well, he had the minor  
20    daughter's family. We have just heard from her mother that  
21    they were friends. And if I understood her testimony  
22    correctly, until she found out what he had done to her  
23    minor daughter, they were family friends. They lived next  
24    door to each other. I know that he lost as a friend the  
25    victim's uncle, but there were people there in the

1 neighborhood who were at least somewhat props.

2 And he blamed it secondly on methamphetamine.  
3 Well, I have dealt with a lot of methamphetamine users, and  
4 not all of them did what he did or have done what he did.  
5 I don't know exactly how methamphetamine use translates  
6 into the commission of the crime that he has been convicted  
7 of; but if, in fact, he is correct that it causes brain  
8 damage and that brain damage is irreversible, then there is  
9 nothing that can be done about it. His brain is as it is  
10 now, which means that he might do it again if you take it  
11 to its fullest consequences.

12 Then he said, "Well, I lost access to adult porn  
13 so I had to commit this act."

14 And I have already quoted from the report where  
15 quoting her, "He abused the child because he felt he could  
16 get away with it. Again, he reiterated it was not that he  
17 wanted to have sexual contact with a child. He wanted to  
18 have sex and she was there."

19 And I'm not sure how loss of adult porn can  
20 excuse a man from committing the crime for which he was  
21 convicted.

22 Then he said his medical condition was an excuse  
23 or a factor for the Court to take into consideration  
24 because he has terrible teeth problems. You get terrible  
25 teeth problems from methamphetamine use. And that is a

1 well-known consequence of methamphetamine use. I don't  
2 think teeth problems had anything to do with his childhood  
3 or the loss of the puppies when he was young or the  
4 exposure to abuse from a friend when he was young, which he  
5 has never stated to anyone what this abuse consisted of.

6 Then there are the issues about double punishment  
7 because he has been charged in state court with rape,  
8 sodomy, and sexual abuse of a minor child. And he is now  
9 convicted in federal court of a federal crime that has some  
10 of the elements that the state crime has or the state  
11 crimes have, but not all of them because they are  
12 different. And we live in a country where we have federal  
13 law and state law. That's how the founders and Congress  
14 have made these laws, and I don't see anything in 18,  
15 3553(a)(2) that says that that's a factor the Court can  
16 take into consideration.

17 He says he was attentive to his grandmother, his  
18 friend who testified in open court today. He was honest.  
19 He returned his wallet. Well, he was apparently attentive  
20 to the victim's family and agreed to keep the little girl's  
21 dog.

22 And then he says he was stoned. And I know that  
23 Mr. Rasmussen has clarified that by saying that he was not  
24 really smoking at the time. He was doing drugs at the  
25 time.

1           And then there's factors on the other side of the  
2       equation, and that is -- well, I should say, too, that  
3       many, many people have family members who die, fathers who  
4       die of cancer, including me when I was young, who have had  
5       relationships with women that fell apart, and who have had  
6       animals that died. And lots of people in the normal  
7       society live without criminal actions having had all those  
8       experiences. The defendant abused the trust the victim's  
9       family had placed in him, and I think the victim's mother  
10      made that perfectly clear.

11           The report says that he knew right from wrong,  
12      but on page 6 of the report he says, "Mr. McBurnette stated  
13      that no one was more surprised than he when he was arrested  
14      for the charges than he was. He woke up in jail and asked  
15      himself why he was there, and then he remembered. And he  
16      said, 'No, not me,'" which goes back to his argument here  
17      in open court today that it was a mistake.

18           Well, this Court does not believe it was a  
19      mistake. First of all, Mr. Fortune is correct in the way  
20      he recounted the testimony that was given at trial with  
21      respect to the preparation, the visits on various Web  
22      sites, the showing of the adult pornography to the minor  
23      child before he actually came to the production of the  
24      videotape he was convicted for. He is very bright. His  
25      mother has testified that he was very bright in school,

1 that he was bored. Well, maybe he was bored that day, too.  
2 I don't know. But he was smart and he prepared it. He  
3 even prepared it to such an extent that while he was  
4 showing her adult pornography, he had phony telephone  
5 conversations with Direct TV that, oh, the TV was switching  
6 channels automatically from a channel that a child would  
7 watch to adult pornography.

8 And I think it has been pointed out that he  
9 placed money on the floor, had two cameras, all in  
10 preparation for what he was going to do and how he was  
11 going to prevent the minor victim from talking.

12 And, finally, we are not just talking about  
13 looking at the Internet. We are talking about making a  
14 videotape using a live little girl, having made  
15 preparations for this in advance, and planning how to get  
16 her to not tell.

17 And, finally, I want to say about recidivism, I  
18 have read the report, and one thing that stuck out on page  
19 14 in the report of the psychologist is that he has no  
20 history of noncontact sexual interest or being convicted of  
21 noncontact sexual behavior. He did not offend against a  
22 male child. Offenders who have offended against male  
23 children or male adults recidivate at a higher rate than  
24 compared to those who do not have male victims, but it does  
25 say that Mr. McBurnette did offend against a nonfamily

1 member which increases his recidivism rate.

2 I think the guidelines are appropriate. I think  
3 the Court has the authority to impose a sentence other than  
4 that recommended by the advisory guidelines, but the Court  
5 really can see no reason to depart from the sentence called  
6 for by application of the guidelines in this case. I know  
7 that the law as handed down to us by the Supreme Court has  
8 changed the guidelines from mandatory to advisory and even  
9 most recently said they are not presumed reasonable, but I  
10 have looked at all of this. I heard the testimony at the  
11 trial, and I think the guidelines are appropriate.

12 I think the guidelines are appropriate in this  
13 case because of the nature and circumstance of this offense  
14 and the history and characteristics of this defendant, and  
15 I have outlined how it was planned, how those telephone  
16 calls were made, how two cameras were used. I think the  
17 guideline sentence is an appropriate sentence to reflect  
18 the seriousness of the offense, to provide just punishment  
19 for the offense, and to promote respect for the law. I  
20 think the guideline sentence is appropriate to protect the  
21 public from further crimes of the defendant, and I think  
22 that is the most important factor in this case. And I  
23 think the guideline sentence is an appropriate sentence to  
24 avoid unwarranted sentencing disparities among defendants.

25 And for those reasons pursuant to the Sentencing



1 Reform Act of 1984, it is the judgment of the Court that  
2 the defendant, Martin Tracy McBurnette, is hereby committed  
3 to the custody of the Bureau of Prisons to be imprisoned  
4 for a term of 360 months. The guideline range of  
5 imprisonment would normally be life. However, because the  
6 guideline range exceeds the statutory maximum, the  
7 statutory maximum becomes the guideline sentence pursuant  
8 to United States Sentencing Guidelines 5G1.1(a), and I have  
9 stated my reasons.

10 The forfeiture and restitution issue has been  
11 resolved by the parties, but will be resolved by a separate  
12 order. The Court is not imposing a fine because I find  
13 that the defendant does not have the ability to pay the  
14 fine in addition to the forfeiture restitution subject  
15 matter that has been worked out by the parties, but the  
16 Court does order the defendant to pay the United States a  
17 special assessment of \$100 which is due immediately.

18 Upon release from imprisonment, the defendant is  
19 placed on supervised release for the rest of his life.  
20 That's a life term. While on supervised release,  
21 Mr. McBurnette, you shall comply with the standard  
22 conditions of supervised release of record in this court.  
23 It is your obligation to familiarize yourself with those.  
24 And if you don't understand them, ask the probation officer  
25 about them because ignorance of the rules will not excuse

1 you from complying with them.

2           There are some special conditions that I will now  
3 read into the record: First, due to your history of  
4 substance abuse, you shall participate under the  
5 administrative supervision of the probation officer in a  
6 drug and alcohol intensive counseling and aftercare service  
7 program conducted by the probation office or a comparable  
8 program conducted in the district of supervision.

9           Two, you shall participate under the  
10 administrative supervision of the probation office and the  
11 probation officer's computer restriction monitoring program  
12 or a comparable program in the district of supervision.

13           Three, you shall not have any unsupervised  
14 one-to-one contact with any children under the age of 18  
15 other than your own children, if there should be any.

16           Four, you shall not engage in any occupation,  
17 employment, or volunteer activities which would place you  
18 in a position with children under the age of 18.

19           Five, pursuant to the Adam Walsh Child Protection  
20 Act of 2006, you shall register as a sex offender not later  
21 than three business days from release if placed on  
22 supervised release before sentencing or if placed on  
23 probation, which obviously you will not. You shall keep  
24 the registration current in each jurisdiction in which you  
25 reside or are employed. You shall no later than three

1 business days after each change in name, residence,  
2 employment, or student status appear in person in at least  
3 one jurisdiction in which you are registered and inform  
4 that jurisdiction of all changes in the information. And  
5 failure to do so may not only be a violation of this  
6 condition but may also be a new federal offense punishable  
7 by up to 10 years imprisonment.

8 Six, you shall allow the probation officer access  
9 to any photographs and/or videorecording you may possess.

10 Seven, you being a felon and being required to  
11 register under the Sex Offender Registration and  
12 Notification Act shall submit your person and any property,  
13 house, residence, vehicle, papers, computers, other  
14 electronic communications, or data storage devices or media  
15 and effects to search at any time with or without a warrant  
16 by any law enforcement or probation officer with reasonable  
17 suspicion concerning a violation as a condition of  
18 supervised release or unlawful conduct by the person or by  
19 any probation officer in the lawful discharge of the  
20 officer's supervisory functions.

21 Finally, you are ordered to participate in an  
22 approved mental-health treatment program specializing in  
23 sex offender treatment under the administrative supervision  
24 of the probation officer. This program may include a  
25 psychosexual evaluation, family, group, and/or individual

1 counseling and psychological and clinical polygraph  
2 testing. The results of the polygraph examinations may not  
3 be used as evidence in court for the purpose of revocation  
4 of this provision or may be considered in a hearing to  
5 modify the conditions of release. While participating in  
6 treatment, you shall abide by all rules and requirements of  
7 the program, and you shall contribute to the cost of the  
8 treatment and polygraph testing unless the probation  
9 officer determines that you do not have the ability to do  
10 so.

11 And, finally, I would like to recommend that  
12 while you serve this sentence that you also be allowed to  
13 participate in mental-health treatment that may be offered  
14 by the Bureau of Prisons for sex offenders.

15 Are there any objections from any party as to the  
16 findings of facts, the calculations, the sentence, or the  
17 manner in which the sentence was pronounced or imposed  
18 other than those the Court has already dealt with and ruled  
19 on?

20 MR. FORTUNE: None from the Government, Your  
21 Honor.

22 MR. RASMUSSEN: No, Your Honor.

23 THE COURT: Okay. Mr. McBurnette, you have the  
24 right to appeal this sentence imposed within 10 days if you  
25 believe the sentence is in violation of law. With a few

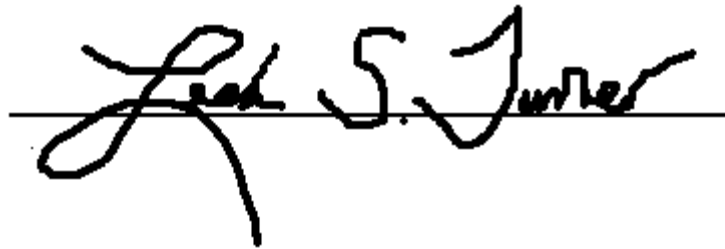
1 exceptions, any notice of appeal must be filed within  
2 10 days of the judgment being entered in this case, which  
3 is the day I sign it. That will be more likely today or  
4 tomorrow. If you are unable to pay the cost, you may apply  
5 for leave to appeal *in forma pauperis* and for appointment  
6 of counsel. And if you are allowed by the court to proceed  
7 on appeal *in forma pauperis* upon your request, the clerk of  
8 the court will assist you in preparing and filing a notice  
9 of appeal. He is remanded back in your custody.

10 (End of proceedings.)  
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C E R T I F I C A T I O N

I hereby certify that the foregoing transcript  
in the above-styled cause is true and accurate.

Date: 6/08/09.

A handwritten signature in black ink, reading "Leah S. Turner", is written over a horizontal line.

**Leah S. Turner, CSR, RMR, CRR**  
**Federal Official Court Reporter**

Certified Shorthand Reporter - 225 wpm  
Registered Merit Reporter - 260 wpm  
Certified Realtime Reporter